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No. 01-1572

In the
Supreme Court of the United States

COOK COUNTY, ILLINOIS,
Petitioner,

v.

UNITED STATES *EX REL.* JANET CHANDLER, PhD.,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

BRIEF *AMICUS CURIAE* OF TAXPAYERS AGAINST FRAUD, THE FALSE CLAIMS ACT LEGAL CENTER IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*

Amicus curiae Taxpayers Against Fraud, the False Claims Act Legal Center, is a nonprofit public interest organization dedicated to combating fraud against the federal government through the promotion of the *qui tam* provisions of the False Claims Act, 31 U.S.C. § 3729 *et seq.* ("FCA" or "the Act"). It has a profound interest in ensuring that the Act is appropriately interpreted and utilized. The issue here is the applicability of the FCA to local government entities accused of defrauding the U.S. Treasury. Creation of municipal immunity from the FCA would gravely undermine the efficacy of the Act in policing fraud on the federal government by exempting from liability the cities and counties that receive hundreds of billions of dollars in federal funds.[1]

SUMMARY OF ARGUMENT

A corporation is a "person" that can be sued under the False Claims Act, 31 U.S.C. § 3729(a). That is a presumption expressly reaffirmed by this Court in *Vermont Agency v. United States ex rel. Stevens*, 529 U.S. 765, 782 (2000). It was well established when the FCA was enacted in 1863 that municipal corporations, like other corporations, were liable in court for their wrongs. *See Will v. Michigan*, 491 U.S. 58 (1989);*City of Newport v. Fact Concerts*, 453 U.S. 247 (1981); *Owen v. City of Independence*, 445 U.S. 622 (1980); *Monell v. Dept. of Social Services*, 436 U.S. 658 (1978). When Congress amended the FCA in 1986, it did not narrow that meaning of "person." Rather, it stated that it understood "persons" to include cities and counties. Therefore, counties such as Petitioner Cook County may be held liable under the FCA.

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[1] Letters of consent from both parties have been filed with the Clerk of the Court. No counsel for any party authored this brief in whole or in part, nor did any party make a monetary contribution to the brief, which has been financed and prepared by *amicus curiae* and its counsel.

The common-law rule against imposing punitive damages on cities does not apply here because Congress designed and characterized the FCA's treble damages as *compensatory liquidated damages*, not as punishment. In 1986 Congress increased the FCA's double damages remedy, which this Court has always deemed compensatory, to treble damages, in order to ensure that the Treasury is made whole for the injuries wrought by false claims. Treble damages ensure full compensation for such things as the cost of discovery, investigation and prosecution of frauds, pre-judgment interest, and consequential damages. Congress expressly designated the FCA's treble damages as compensatory, not punitive, and that legislative judgment is entitled to judicial deference. *See United States v. Bornstein*, 423 U.S. 303 (1976); *Hudson v. United States*, 522 U.S. 93 (1997).

The FCA's treble damages bear none of the indicia of punitive damages, nor do they implicate the policy concerns about punitive damages that troubled this Court in *Newport v. Fact Concerts*. But even if the FCA's treble damages were to be deemed punitive, Congress has displaced the common-law rule against imposition of punitive damages. Congress did so in 1986 by deliberately increasing the Treasury's recovery to treble damages in the face of (1) the settled presumption that municipal corporations are "persons" liable under the Act, and (2) Congress's own express recognition in the legislative record that municipalities are "persons" under the Act.

To be sure, a treble damages judgment might be burdensome on a county. But one does not stumble innocently into FCA liability: it is imposed only for intentional fraud. When the choice as to who should bear the cost of that fraud is between the taxpayers of the county that perpetrated and benefitted from the fraud, and the innocent and injured taxpayers of the United States, Congress's choice is clear. And it is Congress, not the judicial branch, that the Constitution empowers to make that

choice. Petitioner asks this Court not just to shield cities and counties from treble damages, but to immunize them completely from *any* liability whatever under the False Claims Act. A decision immunizing Cook County from any and all FCA liability, on the basis of a common-law rule that Congress has overridden, would be a usurpation of legislative power.

ARGUMENT

I. COUNTIES ARE "PERSONS" SUBJECT TO LIABILITY UNDER THE FALSE CLAIMS ACT.

A. *Stevens* Reaffirmed That the FCA's Reference to "Persons" Presumptively Includes Counties.

Vermont Agency v. United States ex rel. Stevens, 529 U.S. 765 (2000), held that States could not be sued under the FCA due to the "longstanding interpretive presumption that 'person' does not include the sovereign." *Id.* at 780. "[C]omity and respect for our federal system demand that something more than mere use of the word 'person' demonstrate the federal intent to authorize" suit against a sovereign state. *Id.* at 780 n.9. "[I]f Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'" *Will v. Michigan*, 491 U.S. 58, 65 (1989).

But no such "clear statement" rule protects "municipal corporations" because, unlike States, they are not sovereign. *Alden v. Maine*, 527 U.S. 706, 756 (1999). Therefore, "[t]here is certainly no constitutional impediment to municipal liability" under the FCA. *Monell v. Dept. of Social Services*, 436 U.S. 658, 690 n.54 (1978).

Indeed, *Stevens* explicitly reaffirmed that the "presumption with regard to corporations is *just the opposite* of the one

governing here: *they are presumptively covered by the term 'person.'*" 529 U.S. at 782 (emphasis added). "'[A]ny natural person, partnership, corporation, association, or other legal entity'" is "presumptively *covered* by the term 'person.'" *Id.* at 784 n.14 (original emphasis). The Court stressed that nothing in the text, structure or history of the FCA "cast[s] doubt upon the courts' assumption that §3729(a) extends to corporations." *Id.*

This Court has held many times that, like private corporate bodies, public corporations such as "municipalities are persons." *Will*, 491 U.S. at 70. *See also id.* at 69 n.9 ("towns, cities, and counties" are subject to suit); *Owen v. City of Independence*, 445 U.S. 622, 639 & n.19 (1980) (all "local governmental units" are subject to suit as "persons"); *Monell*, 436 U.S. at 687 ("the 'usual' meaning of the word 'person' would extend to municipal corporations"); *City of Newport v. Fact Concerts*, 453 U.S. 247, 259 (1981) ("a municipality, like a private corporation, was to be treated as a natural person subject to suit for a wide range of tortious activity.").

B. Municipal Corporations, Like Other Corporations, Were Included Within the FCA's Reference to "Persons" When the Statute Was Enacted in 1863.

When the FCA was enacted it was hornbook law that "[t]here is nothing in the character of a municipal corporation which entitles it to an immunity from liability for such malfeasances as private corporations or individuals would be liable for in a civil action." T. Shearman & A. Redfield, A TREATISE ON THE LAW OF NEGLIGENCE §120, p. 139 (1869) (quoted in *Owen*, 445 U.S. at 640). Furthermore, "this fact was well known to Congress" in the 1860s. *Monell*, 436 U.S. at 688. *See also id.* at 688 n.50 ("'Counties, cities and corporations of all sorts . . . have become thoroughly established to be an individual or person'") (Court's brackets and citation omitted).

Petitioner effectively asks the Court to revisit and reject this entire body of authority holding that counties are persons. Pet. Br. 13.[2] Petitioner concedes that cities and counties were understood to be "persons" in *1869*, but contends that this was not the case in *1863* when the FCA was enacted. *See* Pet. Br. 14-16. Perhaps something magical and revolutionary is supposed to have transpired in those six short years. Given that Petitioner asks this Court to replow old ground, it is remarkable that Petitioner did not survey that terrain more thoroughly itself: Petitioner's legal history is simply wrong.

As Chief Justice Lemuel Shaw wrote *in 1837*, "[t]hat an action sounding in tort, will lie against a corporation, though formerly doubted, *seems now too well settled to be questioned. And there seems no sufficient ground for a distinction in this respect, between cities and towns and other corporations.*" *Thayer v. City of Boston*, 36 Mass. 511, 516 (1837) (emphasis added).[3]

This Court's own decisions – the ones Petitioner carefully avoids – confirm that cities and counties were liable (just like other corporate persons) long before 1863. In *Owen*, *citing cases from as early as 1825*, decades before the FCA was enacted, this

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[2] Curiously, Petitioner discusses only the *Monell* decision and fails to mention, much less distinguish, the similar holdings in *Owen*, *Will*, and *Newport*. *See* Pet. Br. 13-14.

[3] *See also Town Council of Akron v. McComb*, 18 Ohio 229, 230 (1849) (holding that "a municipal corporation is liable for an injury resulting to the property of another," and rejecting the assertion that such a ruling "introduced a new doctrine in reference to corporations, opposed to the current of authorities, and of doubtful propriety"); *Elliot v. Concord*, 27 N.H. 204, 208, 209 (N.H. 1853) ("the general policy of the law . . . is to subject the town to the action of the party who suffers damage," and "it cannot admit of question that the town is liable, in the first instance, to the sufferer" as any other defendant would be).

Court recognized that counties "were treated as natural persons for virtually all purposes of constitutional and statutory analysis. . . . Local government units were regularly held to answer in damages for a wide range of statutory and constitutional violations." 445 U.S. at 639 & n.19. "[I]t was understood that a municipality's tort liability in damages was identical to that of private corporations and individuals." *Id.* at 640.[4]

Among the cases cited by *Owen* was *Commissioners of Knox County v. Aspinwall*, 62 U.S. 539 (1859). *Knox County* was a federal suit against a county for failure to pay interest on municipal bonds. 62 U.S. at 540. The dissent objected that the suit could not be brought because the defendant was a municipal corporation, *id.* at 546, but the Court dismissed this argument as a "minor point[] . . . which we have considered, but which it is not important should be particularly noticed." *Id.* at 546.[5]

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[4] It is hardly surprising that private and public corporations were treated alike in this regard, because both corporate forms were created in the same way: by the grant of a charter from the sovereign. If anything, municipal corporations *preceded* private corporations. Most eighteenth century corporations were "cities or boroughs," L. Friedman, A HISTORY OF AMERICAN LAW 166 (1973), and "the archetypal American corporation of the eighteenth century [wa]s the municipality . . . in the nineteenth century it [wa]s the modern business corporation." M. Horwitz, THE TRANSFORMATION OF AMERICAN LAW 1780-1860 112 (1977). One of the natural incidents of corporate status was the ability to sue and be sued like other persons. Several colonial charters, including those of Massachusetts, Connecticut, Rhode Island, and Georgia, specified that the non-sovereign corporate bodies established thereunder could sue and be sued. *See* 5 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 36 (W. Swindler ed. 1975) (Massachusetts); 2 *id.* at 131 (Connecticut); 8 *id.* at 363 (Rhode Island); 2 *id.* at 434 (Georgia).

[5] In *Owen* this Court also relied upon *Mayor, Aldermen, and Commonalty of the City of New York v. Ransom*, 64 U.S. 487, 489 (1860) (upholding a patent infringement suit brought by an individual against the city in federal court); *Inhabitants of Searsmont v. Farwell*, 3 Me. 450, 452 (1825) (holding a town liable at common law for breach of contract

In *Newport v. Fact Concerts, citing cases from as early as 1846*, this Court stated that "it was generally understood" that "a municipality, like a private corporation, was to be treated as a natural person subject to suit for a wide range of tortious activity." 453 U.S. at 259.[6]

Petitioner arrives at the opposite (and erroneous) conclusion about municipal liability because Petitioner confuses the issue of *liability* with the issue of *jurisdiction.* The former question asks whether a municipal corporation can be sued as a party; the latter asks how one pleads federal diversity jurisdiction over a corporate entity: need one aver only the State of the defendant's incorporation, or must one also aver the State residence and citizenship of each of the corporation's individual corporators? *See* Pet. Br. at 14-16 (discussing corporate status "for purposes of jurisdiction" in "federal courts"). That issue has no bearing on this case.[7]

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damages); and *Paul v. School Dist. No. 2*, 28 Vt. 575 (1856)(damages action against a municipal school district for wrongful discharge and breach of contract).

[6] Among the cases cited by *Newport* were *City Council of Montgomery v. Gilmer & Taylor*, 33 Ala. 116 (1858), and *M'Gary v. President & Council of the City of Lafayette*, 12 Rob. 668 (La. 1846). *Montgomery* considered the proposition that municipal corporations were persons that could be held liable for negligence and found it to be "consistent with reason, demanded by justice, and supported by a preponderance of authority." 33 Ala. at 130. *M'Gary* held a municipal corporation liable, and further held that the plaintiff was entitled to full damages because the defendant's status as a public corporation was no basis on which to limit the plaintiff's recovery "to a bare indemnity." 12 Rob. at 668-69, 674.

[7] The cases Petitioner discusses all involved questions of pleading federal diversity jurisdiction over corporations and did not purport to cast doubt on the settled proposition that municipal corporations could be sued in any court wherein the plaintiff could obtain jurisdiction. *See Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 86-87, 91-92 (1809); *Louisville, Cincinnati and Charleston R.R.Co. v. Letson*, 43 U.S. (2 How.) 497, 554

C. As *Stevens* Held, Congress Did Not Narrow the Meaning of "Persons" When it Amended Other Language in the FCA in 1986.

Stevens held that Congress made no significant changes to the operative language of §3729(a) in 1986 and, therefore, that the 1863 understanding of the term "person" continues to govern interpretation of the FCA. The "term 'person' has remained in the statute unchanged since 1863; the 1986 amendment merely changed the modifier '[a]' to 'any.'" 529 U.S. at 783 n.12 (brackets by the Court).

The legislative history confirms that Congress understood the 1863 FCA to reach counties that defraud the federal government: "The term 'person' is used in its broad sense to include partnerships, associations, and corporations . . . as well as States *and political subdivisions thereof.*" S. Rep. No. 345, 99th Cong., 2d Sess. 8 (1986) (emphasis added). *Stevens* stated that this report sets forth Congress's understanding of the meaning of the original FCA, as enacted in 1863, 529 U.S. at 783 n.12, under which cities *had* (contrary to Petitioner's misrepresentations) been defendants in FCA actions. *See, e.g., United States v. Bd. of Educ. of Union City*, 1985 U.S. Dist. LEXIS 14917 (D.N.J. Oct. 15, 1985). This passage therefore negates any insinuation that Congress, in 1986, intended to narrow the term "person" or otherwise disturb the long-established understanding that "person" includes counties.

To be sure, *Stevens* made plain that the Senate Report was mistaken in its historical conclusion that *States* were "persons" under the FCA in 1863. 529 U.S. at 783 n. 12. The sovereign immunity of states, established by the Eleventh Amendment and centuries of legal tradition, cannot be overturned without a clear

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(1844); *Cowles v. Mercer County*, 74 U.S. (7 Wall.) 118, 121-22 (1869).

statement in the statutory text; a single sentence from a legislative report will not suffice. *Id.* at 780-81 & n.9; 783 n.12. But, as *Stevens* itself reiterated, with respect to *municipalities* the presumption is precisely *opposite*: that they *are* persons. *Id.* at 782. As the court below explained, "while the committee report was incorrect with respect to the liability of states under the FCA before 1986, we believe it was correct in asserting that political subdivisions of states were, and are, subject to suit under the FCA so long as they are not properly considered arms of the state itself." *United States ex rel. Chandler v. Cook County*, 277 F.3d 969, 975 n.8 (7th Cir. 2002).

The Senate Report confirms that Congress's intent in amending the FCA in 1986 was to adhere to this long settled statutory interpretation. The point is *not* that the 1986 Senate Report tells us what the 1863 Congress intended – it does nothing of the sort. Rather, it tells us that the 1986 Congress fully understood that cities and counties had always been "persons" subject to the FCA, and that Congress nevertheless deliberately increased the remedy to treble damages. Thus did Congress override the common-law rule against imposition of punitive damages, as explained in Part II.B. below.

If anything, the 1986 amendment to § 3729(a) *broadened* the meaning of "person." As the *Stevens* Court noted, the indefinite article "a" was changed to "any," and the Act thus reaches "any person" without qualification. 529 U.S. at 783 n.12. "Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *United States v. Gonzales*, 520 U.S. 1, 5 (1997). Because the term "any" imports "no restriction," *United States v. Turkette*, 452 U.S. 576, 580 (1981), or "limitation," *Int'l Union of Operating Engineers v. Flair Builders*, 406 U.S. 487, 491 (1972), it "leaves no doubt as to the congressional intention to include all" members of the category identified by the enactment. *United States v. Rosenwasser*, 323 U.S. 360, 363 (1945).

This analysis is buttressed by the settled proposition that Congress intended the FCA to be broadly construed. *See* S. Rep. No. 345 at 7-8, 11; *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 541 n.5 (1943) ("'The statute is a remedial one. . . . and should be construed accordingly.'"). In *Monell* the Court explained how this rule of broad construction is to be applied to the precise question presented here:

> since municipalities through their official acts could, equally with natural persons, create the harms intended to be remedied by [the statute], and, further, since Congress intended [the statute] to be broadly construed, there is no reason to suppose that municipal corporations would have been excluded from the sweep of [the statute].

436 U.S. at 685-86.

Therefore, the 1986 amendments and their legislative history establish that Congress did not narrow the definition of "person" to exclude the counties and cities that had always been understood to be included in the Act.

II. FCA Treble Damages Apply to All "Persons" Liable under the Statute, Including Counties.

Neither the Eleventh Amendment nor the principle of sovereign immunity extends to municipal corporations, hence there is no absolute rule immunizing counties from punitive damages. There is only a presumption against such liability, derived from the common law and used by this Court as an aid in statutory interpretation. *See Newport*, 453 U.S. at 263; *Stevens*, 529 U.S. at 785. Whether that common-law immunity applies under the FCA is a question of "statutory construction," *Owen*, 445 U.S. at 635, and requires a "careful inquiry into considerations of both history and policy." *Newport*, 453 U.S. at

259. If there is "evidence that Congress intended to disturb the settled common-law immunity," that congressional intent is controlling. *Newport*, 453 U.S. at 266.[8]

This Court should affirm the ruling below, that FCA treble damages may be imposed on counties, for three independent reasons: (1) the common-law presumption against imposing punitive damages on cities does not apply here, because Congress designed the FCA's treble damages remedy as compensation rather than punishment and that legislative judgment is entitled to judicial deference; (2) Congress in any event displaced the presumption when it enacted an elaborate, carefully crafted damages regime for the FCA; and (3) the policies that weigh against imposition of punitive damages, which this Court reviewed in *Newport*, are not implicated by the FCA treble damages provisions.

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[8] *Newport* quoted *Pierson v. Ray*, 386 U.S. 547, 555 (1967), to the effect that "'Congress would have specifically so provided had it wished to abolish'" a particular immunity doctrine. 453 U.S. at 263. But neither *Newport* nor *Pierson* in fact required Congress to disavow a common-law rule in so many words. Accordingly, this Court has repeatedly held that it is enough that the "legislative record" provide "clear indication" of Congress's intent to establish a different rule. *Pierson*, 386 U.S. at 554. *See also Newport*, 453 U.S. at 263-64 (common-law immunity may be overridden by congressional "intent' as revealed in "legislative debates" and "legislative history"); *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951) (question is whether "Congress thought it had exercised the power" to establish the liability in question).

A. The Common-Law Presumption Against Imposing Punitive Damages On Cities Does Not Apply, Because Congress Designed the FCA's Treble Damages Remedy To Be Compensatory Rather than Punitive, And That Congressional Judgment Is Entitled To Deference.

Petitioner appears to labor under the misapprehension that the FCA was required to contain a phrase such as "we hereby set aside common-law municipal immunity and impose punitive damages on cities." Pet. Br. 22. As explained above, pages 10-11 & note 8, that is not the legal standard. But even if it were, there is a more immediate reason why Congress did not utter any such incantation to set aside the presumption against *punitive* damages: Congress designed the FCA's treble damages to be *compensatory*, not punitive, and the presumption is therefore simply inapplicable. Congress's characterization of the FCA's treble damages as compensatory is entitled to substantial deference.

1. Before *Stevens*, the FCA had always been understood by this Court as compensatory, and this Court has likewise characterized some treble damages regimes as compensatory rather than punitive.

As this Court acknowledged in *Stevens*, it has consistently held that the double damages imposed by the original 1863 FCA "were remedial rather than punitive." 529 U.S. at 785. In *Hess*, the Court squarely held that FCA "proceedings are remedial." 317 U.S. at 549. Compensation was the legislative purpose, and "the device of double damages plus a specific sum was chosen to make sure that the government would be made completely whole." *Id.* at 551-52. In *United States v. Bornstein*, 423 U.S. 303, 315 (1976), the Court confirmed "this make-whole purpose" of the FCA's double damages provision: "this method of

computation comports with the congressional judgment that double damages are necessary to compensate the Government completely for the costs, delays, and inconveniences occasioned by fraudulent claims." In *United States v. Halper*, 490 U.S. 435 (1989), *overruled on other ground by Hudson v. United States*, 522 U.S. 93 (1997), the Court explained that "proceedings under the statute were remedial and designed to 'protect the government from financial loss'— rather than to 'vindicate public justice.'" 490 U.S. at 444.[9]

The argument that the FCA's treble damages trigger the common-law presumption against imposition of punitive damages on counties is predicated on a passage in *Stevens* wherein this Court remarked that treble damages "are essentially punitive in nature," 529 U.S. at 784. Given that the result in *Stevens* was compelled by the principles of State sovereign immunity, the Court had no occasion to elaborate further and no occasion to examine Congress's findings on FCA treble damages. Furthermore, if *Stevens*' reference to treble damages were understood as a holding that *all* treble damages are *necessarily* punitive, it would be in tension with cases in which

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[9] It has been argued that the justification for doubling damages in the 1863 FCA was to offset the portion of the recovery (50%) that went to a successful *qui tam* relator under the original Act. *See* Brief *Amicus Curiae* of Delaware County at 7. But this Court has already rejected this point. First, double damages were awarded even when the United States brought suit itself, in which case the Treasury received every nickel of the judgment. Second, the relator's portion of any award was cut to a maximum of 25% in 1943, and Congress placed other restrictions on *qui tam* actions, yet "[i]n adopting these changes, Congress did not make any adjustment in the double-damages provision, again suggesting that it thought that double damages are *necessary to make the United States whole* in fraudulent claim cases." *Bornstein*, 423 U.S. at 316 n.11 (emphasis added).

this Court has held that some treble damage regimes must be understood as primarily compensatory.[10]

The question of whether (and for which purposes) a particular treble damages regime should be deemed punitive or remedial is a subtle one not susceptible to hasty categorical resolution. *Amicus* Taxpayers Against Fraud therefore suggests that *Stevens'* characterization of FCA treble damages must be understood in light of the Court's interpretive presumption in that case—dictated by the Eleventh Amendment—that sovereign States are not "persons" under the FCA. That consideration carries no weight where, as here, the Court has confirmed that the *opposite* interpretive presumption applies — *i.e.*, private and municipal corporations *are* "persons" under the FCA.

2. The legislative analysis prescribed by *Newport* reveals that Congress imposed treble damages to ensure full compensation for the U.S. Treasury, rather than as a punitive measure.

The legislative record reveals that Congress amended the FCA in 1986 to increase recoverable damages from double to

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[10] *See, e.g.*, *American Society of Mechanical Engineers v. Hydrolevel Corp.*, 456 U.S. 556, 757-76 (1982) (unlike punitive damages, antitrust treble damages can be imposed on an agency theory because "the antitrust private action was created primarily as a remedy for the victims of antitrust violations"); *Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477, 485-86 (1977) (although antitrust treble damages "play an important role in penalizing wrongdoers . . . it is nevertheless true that the treble-damages provision, which makes awards available only to injured parties, and measures the awards by a multiple of the injury actually proved, is designed primarily as a remedy"); *Agency Holding Corp. v. Malley-Duff & Assoc.*, 483 U.S. 143, 151 (1987) ("Both RICO and the Clayton Act are designed to remedy economic injury by providing for the recovery of treble damages, costs, and attorney's fees . . . Moreover, both statutes aim to compensate the same type of injury").

triple the amount of the fraud specifically "to enhance the Government's ability to recover losses sustained as a result of fraud against the Government." S. Rep. No. 345 at 1. *See also* H.R. Rep. No. 660 at 16. Congress stressed that the remedies available under the 1863 Act were in dire need of modernization. *See* S. Rep. No. 345 at 2, 4; H.R. Rep. No. 660 at 63; 132 Cong. Rec. H6479 (Sept. 9, 1986) (statement of Rep. Glickman); *id.* (statement of Rep. Brooks). As Representative Rodino explained, "This statute has existed for 123 years but is out of date and no longer an effective tool for prosecution of civil fraud cases." 132 Cong. Rec. H6482.

Accordingly, the 1986 amendment increased the damages recoverable in order to "provide the Government with a more effective tool for the recovery of the dollar losses suffered through fraud." *Id.* In concluding that, "[b]ecause of this lapse of time, some of the provisions of the Act are outdated," the House Report specifically noted the deleterious effects of a century of inflation on the adequacy of the FCA's double damages remedy. H.R.Rep. No. 99-660 at 17. Congress concluded that treble damages were necessary to *"make the Government whole for its losses*; and to update the penalty enacted in 1863 to reflect the passage of time and the effects of inflation." *Id.* at 20 (emphasis added).

No change in the remedial character of the FCA's damages was either intended or inadvertently wrought by Congress in the 1986 Amendments. Congress *expressly* reaffirmed that "'[t]he statute is a *remedial* one. It is intended to protect the Treasury against the hungry and unscrupulous host that encompasses it on every side, and should be construed accordingly.'" S. Rep. No. 345 at 11 (quoting *United States v. Griswold*, 24 F. 361, 366 (D. Or. 1885)) (emphasis added). Congress *expressly and repeatedly rejected* the proposition that the FCA treble damages regime was punitive in nature: "False Claims Act proceedings are civil and *remedial* in nature and are brought to recover *compensatory*

damages." S. Rep. No. 345 at 31 (emphasis added). *See also id.* at 31 (FCA is "remedial," "notwithstanding the fact that the Act permits a treble recovery," and therefore appropriate standard of proof is preponderance of the evidence); H.R. Rep. No. 660, 99th Cong., 2d Sess. 25 (1986) ("The False Claims Act is basically a remedial statute").

Not one of the briefs submitted by Petitioner and its *amici*, nor any decision striking down the FCA's application to municipalities, even mentions these congressional findings.

This Court has long endorsed a standard of "rough remedial justice" under the FCA. *Halper*, 490 U.S. at 446. When fraud has been committed on the Treasury, "the precise amount of the Government's damages and costs may prove to be difficult, if not impossible, to ascertain." *Id.* at 449. *See also Rex Trailer Co. v. United States*, 350 U.S. 148, 153 (1956) (same). This Court has therefore held that the government "may demand compensation according to somewhat imprecise formulas." *Halper*, 490 U.S. at 446. The FCA's damages multiplier "is comparable to the recovery under liquidated-damage provisions which fix compensation for anticipated loss." *Rex Trailer*, 350 U.S. at 153. Because the damages resulting from a fraud on the public fisc "may be difficult or impossible to ascertain, . . . it is the function of liquidated damages to provide a measure of recovery in such circumstances." *Id.* at 153-54.

Therefore, this Court has unanimously declared that "[l]iquidated-damage provisions, when reasonable, are not to be regarded as penalties." *Rex Trailer*, 350 U.S. at 151. The Court has further held that the FCA's multiple damages remedy "does not rise to the level of 'punishment' merely because Congress provided for civil recovery in excess of the Government's actual damages." *Halper*, 490 U.S. at 442. Indeed, this Court stated in *Hess* that "*Congress might have provided here . . . for recovery of 'threefold damages.*' . . . This Court has noted the general

practice in state statutes of allowing double or treble or even quadruple damages." 317 U.S. at 550-51 (emphasis added). All of this is a matter of legislative discretion.

This Court has also repeatedly endorsed Congress's goal of "afford[ing] the government complete indemnity for the injuries done it." *Hess*, 317 U.S. at 549. *See also Halper*, 490 U.S. at 445 (same); *Bornstein*, 423 U.S. at 315 & n. 11 (same); *Rex Trailer*, 350 U.S. at 152 (same). Those injuries include "not merely the amount of the fraud itself, but also ancillary costs, such as the costs of detection and investigation, that routinely attend the Government's efforts to root out deceptive practices directed at the public purse." *Halper*, 490 U.S. at 445. *See also id.* at 446 n.6 ("prosecutorial costs . . . must also be factored into the determination"). Since the government does not get a separate award of attorneys' fees or investigative costs in an FCA suit, the trebling of damages is readily understood as a means of roughly approximating the total losses inflicted on the government by the defendant's fraud.[11] Nor does the FCA provide the government with a separate award of pre-judgment interest to compensate the Treasury for the carrying costs or opportunity costs imposed by public fraud. Again, treble damages make up for that.

Furthermore, the trebling of FCA damage awards compensates the federal government for the consequential damages flowing from a fraud on the public fisc. The FCA

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[11] Although an FCA defendant "shall also be liable to the United States Government for the costs of a civil action to recover any such penalty or damages," 31 U.S.C. 3729(a), those "costs" do not include attorneys' fees or the costs of the government's investigation. The relator in a successful *qui tam* action may recover "an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs," 31 U.S.C. 3730(d)(1), but those recoveries do not make the government whole because they go to the relator.

makes no separate award for such consequential injuries. Indeed, Congress enacted the treble damages provision in 1986 as an alternative to adding consequential damages to the prior statute's award of double damages.

The original House version of the bill proposed in 1986 provided for a separate award of consequential damages on top of the doubling of actual damages. *See* S. Rep. No. 345 at 39; 132 Cong. Rec. H6479 (statement of Rep. Glickman); *id.* (statement of Rep. Brooks). Consequential damages were favored by the House so that the FCA would "make the Government whole for its losses; and to update the penalty enacted in 1863 to reflect the passage of time and the effects of inflation." H.R. Rep. No. 660 at 20. *See also* 132 Cong. Rec. H6480 (statement of Rep. Fish) (the House bill "would make consequential damages the measurement standard — thus allowing a recovery for indirect losses that are the result of the fraud as well as actual direct losses. This is a realistic, fair change which ensures the recovery will reflect actual replacement cost in every instance."). In the subsequent conference between the House and Senate, a compromise was reached that deleted consequential damages and substituted treble damages. *See* 132 Cong. Rec. S11238 (Aug. 11, 1986) (statement of Sen Dole); 132 Cong. Rec. S15036-37 (Oct. 3, 1986) (statement of Sen. Grassley); 132 Cong. Rec. H9388 (Oct. 7, 1986) (statement of Rep. Glickman).

Therefore, the treble damages provision of the FCA should be understood as doing nothing more than "afford[ing] the government complete indemnity for the injuries done it," *Hess*, 317 U.S. at 549, including the costs of investigation, attorneys' fees, pre-judgment interest, and consequential damages. Surely the taxpayers and the Treasury are entitled to nothing less.

In both *Stevens* and *Newport*, this Court defined punitive damages as damages "'beyond that amount which will be

sufficient for [the injured party's] indemnification.'" *Stevens*, 529 U.S. at 785 n.15 (citation omitted); *Newport*, 453 U.S. at 261 (same). Because the treble damages provision is nothing more than a full indemnity, it cannot, by definition, be deemed punitive. It therefore does not implicate a municipality's common-law immunity from punitive damages.

3. Congress's characterization of the FCA as non-punitive is entitled to judicial deference.

This Court has indicated that congressional judgments about the damages necessary to make the Treasury whole are entitled to judicial deference. Damages under the FCA are to be calculated and characterized in the way that "most faithfully conforms to the language and purpose of the Act." *Bornstein*, 423 U.S. at 314. To determine whether double damages were a remedy or a punishment in *Bornstein*, the Court inquired into what "Congress intended." 423 U.S. at 314. The Court expressly adopted an understanding of the FCA that "comports with the *congressional judgment* that double damages are necessary to compensate the Government completely." *Id.* at 315 (emphasis added).

In *Hudson v. United States*, 522 U.S. 93, 103-04 (1997), a case involving the Fifth Amendment's ban on double jeopardy, this Court unanimously held that courts should defer to the congressional characterization of a statute as civil and remedial rather than criminal and punitive. The touchstone for such determinations is what "Congress intended" with respect to the statute's penalties, *id.* at 103, and that intention governs unless the party challenging the law adduces "the clearest proof" that Congress mischaracterized its own enactment, *id.* at 104. Accordingly, the *Hudson* Court refused to deem a statute's penalties "'so punitive in form and effect as to render them criminal *despite Congress' intent to the contrary*.'" 522 U.S. at 104 (emphasis added).

If courts are required, even in the context of the Fifth Amendment's Double Jeopardy Clause, to give great weight to Congress's own characterization of a statute as civilly remedial or criminal punitive, and to overrule that determination only upon the "clearest proof," then *a fortiori* the courts should defer to a congressional judgment as to whether a statute is remedial or punitive when, as in the case at hand, no constitutional right is at stake. As the Court has repeatedly concluded with respect to the FCA, the "inherent difficulty of choosing a proper specific sum which would give full restitution was *a problem for Congress*." *Hess*, 317 U.S. at 552 (emphasis added); *Rex Trailer*, 350 U.S. at 152 (same).

Here there is no evidence, let alone "the clearest proof," that Congress's characterization of the FCA's treble damages as remedial was either arbitrary or inaccurate. "It could not be more clear that Congress, in adopting this approach, addressed the situation with careful precision as to what sort of damage scheme was necessary to achieve the goals of the statute." *Chandler*, 277 F.3d at 978. And it was Congress's manifest judgment that the treble damages available under the 1986 Amendments are compensatory.[12]

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[12] Prior to this Court's statement in *Stevens*, the Courts of Appeals had consistently reached the same conclusion. *See United States v. Peters*, 110 F.3d 616, 517 (8th Cir. 1997) ("the FCA's treble-damages provision, which went into effect in 1986, is likewise in the nature of rough remedial justice and therefore not punitive for double-jeopardy purposes."); *United States v. Brekke*, 97 F.3d 1043, 1048 (8th Cir. 1996) ("Although the False Claims Act authorizes treble damages . . . [a] multiple recovery of this type is compensatory rather than punitive, even though it contains a penalty element, unless the amount sought by the government 'bears no rational relation to the goal of compensating the Government for its loss'"), *cert. denied*, 520 U.S. 1132 (1997); *United States v. Barnette*, 10 F.3d 1553, 1559-60 (11th Cir.) (award of treble damages under the FCA does "'no more than make the Government whole'" and is non-punitive "rough justice"), *cert. denied*, 513 U.S. 816 (1994). These decisions were not discussed in *Stevens*.

To be sure, the FCA's treble damages also have a deterrent effect. *See* H.R. Rep. No. 660 at 20. But that does not mean that treble damages are inherently punitive. As this Court has noted with respect to the FCA, "for the defendant even remedial sanctions carry the sting of punishment." *Halper*, 490 U.S. at 447 n.7. Since defendants would prefer not to pay for their wrongs, even the imposition of compensatory damages deters misconduct. Hence there are no "'solely' remedial (i.e., entirely nondeterrent)" damages. *Hudson*, 522 U.S. at 102. Deterrence and punishment are not the same thing. *See Bennis v. Michigan*, 516 U.S. 442, 452 (1996) ("Forfeiture . . . serves a deterrent purpose distinct from any punitive purpose"); *Hudson*, 422 U.S. at 105 (same). Thus in *Bornstein* this Court held that the FCA's double damages were remedial, not punitive, 423 U.S. at 314-15, while simultaneously holding that the damages should be doubled prior to the deduction of any offset amounts, because "[t]his method of computation . . . maximizes the deterrent impact of the double-damages provision," *id.* at 317.

There are other indicia of punitive damages that FCA treble damages do not display, and that therefore confirm that Congress's characterization of FCA damages as compensatory is appropriate. First, unlike FCA damages, punitive damages are a separate element of a judgment, imposed in accord with separate jury instructions, that are added on top of the initial award of compensatory damages. *See Newport*, 453 U.S. at 252-53 (describing jury instructions on punitive damages); *id.* at 256 n.12 ("we deal with a wholly separable issue of law, on which the jury rendered a special verdict"); *id.* at 267 ("These damages are assessed over and above the amount necessary to compensate the injured party."). Punitive damages are expressly imposed as punishment, and they are tailored to punish the particular defendant before the court, with the goal that the amount be sufficient to sting *this* defendant. *See Newport*, 453 U.S. at 270 ("evidence of a tortfeasor's wealth is traditionally admissible as

a measure of the amount of punitive damages that should be awarded").

The FCA's treble damages are nothing like this. They are imposed as one lump sum and are not divided into compensatory and punitive elements. There is no attention paid to the resources of the particular defendant when calculating FCA damages; damages are simply tripled in every case, as a form of liquidated damages to assure full compensation for the government.

Second, the Court has stressed that punitive damages are "'evidently vindictive,'" *Stevens*, 529 U.S. at 785 n.15; *Newport*, 453 U.S. at 261, and are meant to punish those who act with "malice," *Newport*, 453 U.S. at 261, 262, 267. Accordingly, *Newport* held that punitive damages were unavailable against cities under 42 U.S.C. § 1983 because a government entity "can have no malice independent of the malice of its officials" and therefore such damages "are not sensibly assessed against the governmental entity itself." 453 U.S. at 267.

In contrast, there is nothing insensible or incongruous about imposing FCA treble damages on counties because there is no "malice" requirement under the FCA. Indeed, when amending the FCA in 1986, Congress expressly rejected any sort of scienter requirement, whether malice or any other "specific intent to submit the false claim," as wholly out of place in what Congress deemed a "remedial" statute. S. Rep. No. 345 at 7. *See also id.* at 13, 20-21, 31; H.R.Rep.No. 660 at 20-21; 31 U.S.C. § 3729(b) (1986) ("no proof of specific intent to defraud is required").

Therefore, FCA treble damages are not punitive. Congress amended the FCA to impose treble damages in order to assure full indemnity for the U.S. Treasury — the rough remedial justice that this Court has repeatedly endorsed as compensatory, not punitive. Because the FCA's treble damages are not

punitive, they do not implicate the common-law presumption against imposition of punitive awards on cities that concerned the Court in *Newport*.

B. Congress Deliberately Imposed Treble Damages On All FCA Defendants, Including Counties, Thereby Overriding Any Common-Law Immunity.

As explained above, this Court has held that congressional intent controls. The search is for "evidence that Congress intended to disturb the settled common-law immunity" by imposing punitive damages. *Newport*, 453 U.S. at 266. This inquiry yields a different answer in this case than in *Newport*.

In *Newport* there was no indication that Congress intended to impose punitive damages. Indeed, 42 U.S.C. § 1983 is entirely silent on the question of what damages are available: it states only that defendants shall be "liable to the party injured in an action at law." *See Newport*, 453 U.S. at 258 n.17. Because Congress had not specified which damages remedies were available, this Court turned to the common law for guidance in filling in the blanks. *See id.* at 267-68; *cf. Carey v. Piphus*, 435 U.S. 247, 255-58 & nn. 11, 13 (1978). It made perfect sense to hold that the same body of common law that made punitive damages available under § 1983 also limited the population of defendants on whom such damages could be imposed. As the Court noted, the "general rule today is that no punitive damages are allowed unless expressly authorized by statute." *Newport*, 453 U.S. at 261 n. 21 (*quoted in* Pet. Br. 24-25).

Newport dictates the opposite result in this case, because in the FCA Congress "expressly authorized" treble damages "by statute." There is no question that Congress "specifically provided" for treble damages. *Pierson v. Ray*, 386 U.S. at 555; *Newport*, 453 U.S. at 263. "Unlike § 1983, the FCA does not need to borrow a common-law conception of damages; Congress

has provided a clear and consistent remedy for all violations of the FCA." *Chandler*, 277 F.3d at 978.

As demonstrated above, the structure and legislative history of the 1986 FCA Amendments reveal painstaking legislative attention to the goal of making the Treasury whole for frauds and the need for updating a century-old statutory remedy. Congress knew how to limit recovery to the previous level of double damages when it deemed it appropriate. *See* 31 U.S.C. § 3729(a)(7)(A)-(C) (providing that double rather than treble damages may be imposed when the person who defrauded the Government cooperates before learning of the investigation). "It could not be more clear that Congress, in adopting this approach, addressed the situation with careful precision as to what sort of damage scheme was necessary to achieve the goals of the statute." *Chandler*, 277 F.3d at 978.

Congress carefully crafted its treble damages remedy with the express understanding that municipal corporations, like private corporations, were "persons" subject to the FCA. Indeed, as shown above, Congress explicitly noted that it was acting on the premise that the FCA's reference to "person" included "political subdivisions" of States. S. Rep. No. 345 at 8. *See* Part I.C., *supra*. With that interpretation of § 3729(a) in mind, Congress deliberately increased the remedy to treble damages and thereby overrode any contrary common-law rule.

The only alternative explanation is that Congress, in a fit of legislative sleepwalking, increased damages from double to treble and *sub silentio* exempted cities and counties from the False Claims Act *entirely*. This is Petitioner's theory, *see* Pet. Br. 21, and it is absurd.

Thus, even assuming *arguendo* that the FCA's treble damages are to be considered punitive, it is manifest that Congress "thought it had exercised the power" to impose treble

damages. *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951). Therefore, the common-law presumption that cities are not subject to punitive damages has been displaced by Congress's deliberate imposition of treble damages in the 1986 FCA Amendments.

C. The FCA's Treble Damages Do Not Implicate The Policy Objections To Punitive Damages That Concerned This Court In *Newport v. Fact Concerts*.

Even absent evidence of congressional intent to override the presumption against imposing punitive damages on cities, the presumption on its own terms, as explained by this Court, does not constitute a universally applicable policy. Thus, after deciding in *Newport* that there was no evidence that Congress intended to disturb the common-law immunity, the Court stated that it would proceed to "determine whether considerations of public policy dictate a contrary result." 453 U.S. at 266. The Court concluded that it would be "unwise" to allow a punitive award against a city "[a]bsent a compelling reason . . . not present here." 453 U.S. at 271.

In the case at hand we have a compelling public policy reason established by Congress itself — securing full indemnity for frauds committed on the United States by a non-sovereign city or county. In contrast to *Newport*, the victim in this case is not a single party but We the People, and if a fraud is found at trial treble damages will be appropriate to achieve the compelling congressional objective of ensuring that the U.S. Treasury is made whole.

With respect to the policies that weigh against imposition of punitive damages on a city, *Newport* distinguishes itself. The Court expressed its aversion to imposing punitive damages on cities under § 1983 because of the "windfall to a fully compensated plaintiff." 453 U.S. at 267. In the first place, as

explained above, in the judgment of Congress the Treasury is not fully compensated without treble damages. This distinguishes an FCA award from a punitive award that, by definition, is added on top of the fully adequate compensatory award. In enacting the larger damages remedy in 1986, Congress "addressed the situation with careful precision" and "specifically determined" that treble damages are "necessary for the effective operation of the FCA." *Chandler*, 277 F.3d at 978.

Second, in contrast to punitive damages regimes where an already fully compensated plaintiff may reap a windfall when a court diverts to him a punitive award that serves the public law function of visiting society's punishment, under the FCA the Treasury, having borne the full weight of the defendant's fraud, is also the recipient of every dime of damages whenever the United States brings suit.

To be sure, if an FCA suit is brought under the statute's *qui tam* provisions, a successful relator will end up with some portion of the total damage award. But the relator's portion is not an arbitrary allocation made on an ad hoc basis. It is statutorily prescribed (in great detail) and judicially policed. *See* 31 U.S.C. § 3730(d). The briefs of Petitioner and its *amici* (whose ranks include cities and counties accused of defrauding the federal government) display great distaste for *qui tam* lawsuits. *See* Pet. Br. 36-37, Brief *Amicus Curiae* of Nat'l Ass'n of Counties *et al.* at 11, 13-14; Brief *Amicus Curiae* of 43 Local Gov't Airport Proprietors at 11. But regardless what FCA defendants may think, *Congress* saw a need for this particular remedy, and that is the end of the matter. The *qui tam* provision

> "was passed upon the theory, based on experience as old as modern civilization, that one of the least expensive and most effective means of preventing frauds on the Treasury is to make the perpetrators of them liable to actions by private persons acting . . . under the strong stimulus of personal ill

> will or the hope of gain. Prosecutions conducted by such means compare with the ordinary methods as the enterprising privateer does to the slow-going public vessel."

Hess, 317 U.S. at 541 n.5.

Therefore, the relator's share that generates successful FCA lawsuits cannot be considered an instance of waste or diversion of public funds, nor may federal courts disparage or act in derogation of the FCA on the basis of Congress's endorsement of the *qui tam* mechanism. "Congress has power to choose this method to protect the government from burdens fraudulently imposed upon it; to nullify the . . . statute because of dislike of the independent informer sections would be to exercise a veto power which is not ours." *Hess*, 317 U.S. at 541 n.5.

The *Newport* Court was also concerned that punitive awards against cities under § 1983 could be unpredictable, given: (1) the "broad discretion traditionally accorded to juries in assessing the amount of punitive damages;" and (2) the fact that, because "evidence of a tortfeasor's wealth is traditionally admissible as a measure of the amount of punitive damages that should be awarded, the unlimited taxing power of a municipality may have a prejudicial impact on the jury, in effect encouraging it to impose a sizable award." 453 U.S. at 270. These concerns do not exist under the FCA. Neither judge nor jury has unbridled discretion to set punitive damages under the FCA because there are no separate punitive awards: damages are trebled by statutory mandate. No runaway juries are possible and there is no consideration of the defendant's wealth or taxing power.

An FCA judgment against a county could indeed be substantial – *but only if the defendant county's fraud on the U.S. Treasury were substantial*. And in that event the damages visited upon the defendant would be proportionate to the totality of the injury inflicted on the Treasury by the defendant's fraud.

A defendant's complaints about the size of an adverse judgment are entitled to no weight where the "exceptional magnitude of those consequences is the product" of "the immensity" of the underlying transaction and wrongdoing. *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 34 (1987) (Stevens, J., concurring). As demonstrated above, the FCA imposes treble damages to ensure that the U.S. Treasury is *made whole* (including interest, investigative and prosecutorial costs, and consequential damages). It is not a cause of action for unjust enrichment against counties and their constituents, and therefore mere disgorgement of improperly obtained federal funds is not the measure of damages.

Petitioner and its *amici* voice concerns that counties forced to compensate the U.S. Treasury fully for their frauds might have to cut back on local services. Of course, the municipal services that Petitioner refers to are usually subsidized by federal funds. Indeed, Petitioner and its *amici* confirm the need for rigorous enforcement of the FCA by describing the wide range of local services – from airports to police – for which cities use federal dollars (and for which cities have been sued by the federal government for fraud). Enforcement is essential to ensure that those scarce federal dollars are not squandered through fraud. If cities choose to ask for federal money, they must take such funds on the terms Congress chooses – and one of those conditions is that cities not defraud the U.S. Treasury, and be subject to treble damages if they do. "As conventional notions of the proper objects of government spending have changed over the years, so has the ability of Congress to 'fix the terms on which it shall disburse federal money to the States.'" *New York* v. *United States*, 505 U.S. 144, 158 (1992).

The taxpayers of a city or county found to have defrauded the federal government might well feel the pinch of an FCA judgment in terms of increased taxes or decreased services. But (contrary to the argument of *Amicus Curiae* Orange Cty. at 15)

a municipal corporation does not innocently and inadvertently stumble into fraud any more than a private corporation does. Liability under the FCA is not a trap for the unwary: liability is imposed not for mere mistakes, but only for acts of fraud that are knowing, intentional, and willful. 31 U.S.C. §§ 3729(a)(1), (a)(2), (a)(4), (a)(5), (a)(6) & (a)(7).

It may well be regrettable that taxpayers who had no direct part in the frauds of their county officials will suffer the indirect cost of remedying those frauds. But the same is true of innocent employees thrown out of work when their corporate employers are held liable for treble damages under the FCA. Moreover, if the county that commits fraud is not to be held liable for the full cost of the injury it has inflicted upon the Treasury, upon whom should that unavoidable cost be imposed? As Petitioner and its *amici* concede, the taxpayers of that county are the ones who, even if they were not active parties to their county's fraud, nevertheless benefitted from that fraud insofar as their county reaped an undue and indeed fraudulent increase in federal tax support for the county's programs, an increase which redounded to those taxpayers in the form of lower county taxes and enhanced county services. *Amicus* Nat'l Ass'n of Public Hospitals at 19; *Amicus* 43 Local Gov'ts at 10; *Amicus* Orange Cty. at 11; Pet. Br. 35. When the choice as to who should bear the cost of that fraud is between the hapless taxpayers of the county that perpetrated and benefitted from the fraud, and the innocent and injured taxpayers of the United States, Congress's choice is clear. And it is Congress, not the judicial branch, that the Constitution empowers to make that choice.

It cannot be overemphasized that the result urged by Petitioner and its *amici* would negate *any* FCA liability for cities and counties that commit intentional fraud on the U.S. Treasury. *See* Pet. Br. 25 (total "immunity from suit"); *id.* at 37 ("absolute governmental immunity"). This, despite the fact that Petitioner and its *amici* concede that "'a local government can properly be

made to pay compensation for the wrongful acts of its agents.'" Pet. Br. 35. *See also Amicus* Orange Cty. at 11. Petitioner hastens to reassure the Court that other legal mechanisms, including common law claims, exist under which the United States might seek the compensation that Petitioner would deny it under the FCA. Pet. Br. 37-38; *Amicus* Orange Cty. at 12. But Congress determined that such alternatives were inadequate and unreliable, and that is why it enacted the False Claims Act with its treble damages remedy and its *qui tam* provisions. *See supra* pages 26-27. Neither Petitioner nor this Court is empowered to second-guess that legislative judgment. If Petitioner and its *amici* think that the FCA is over-kill, let them make their case to Congress.

CONCLUSION

The federal government disburses hundreds of billions of tax dollars to local governments every year. That level of funding creates enormous opportunity — and enormous temptation — for fraud by cities and counties, and the FCA is the weapon Congress has forged to combat that fraud. The judgment below should therefore be affirmed.

Respectfully submitted,

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